Guideline Sentencing Update

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Determining the Sentence

Consecutive or Concurrent Sentences

Supreme Court holds that § 924(c) sentence cannot be imposed to run concurrently with a state sentence. Under 18 U.S.C. § 924(c), the five-year mandatory sentence for using a firearm during a drug trafficking offense may not be imposed to "run concurrently with any other term of imprisonment." In *U.S. v. Gonzalez*, 65 F.3d 814, 819–22 (10th Cir. 1995), the Tenth Circuit held that a § 924(c) sentence "may run concurrently with a previously imposed *state* sentence that a defendant *has already begun to serve*" (emphasis in original). After reviewing the legislative history and the purpose of § 924(c), the court ultimately concluded that "the phrase 'any other offense' encompasses only federal offenses" and that this interpretation was consistent with USSG § 5G1.3(b). *Cf. U.S. v. Kiefer*, 20 F.3d 874, 876–77 (8th Cir. 1994) (if called for under § 5G1.3(b), mandatory sentence under § 924(e) may be imposed to run concurrently with related state sentence; distinguishing § 924(c) because § 924(e) does not contain specific prohibition against concurrent sentencing); *U.S. v. Drake*, 49 F.3d 1438, 1440–41 (9th Cir. 1995) (following *Kiefer*).

The Supreme Court reversed, concluding that the text of the statute was clear and the Tenth Circuit should not have resorted to the legislative history. "The question we face is whether the phrase 'any other term of imprisonment' 'means what it says, or whether it should be limited to some subset' of prison sentences . . . —namely, only federal sentences. Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' . . . Congress did not add any language limiting the breadth of that word, and so we must read § 924(c) as referring to all 'term[s] of imprisonment,' including those imposed by state courts. . . . There is no basis in the text for limiting § 924(c) to federal sentences."

"Given the straightforward statutory command, there is no reason to resort to legislative history. . . . In sum, we hold that the plain language of 18 U.S.C. § 924(c) forbids a federal district court to direct that a term of imprisonment under that statute run concurrently with any other term of imprisonment, whether state or federal. The statute does not, however, limit the court's authority to order that other federal sentences run concurrently with or consecutively to other prison terms—state or federal—under § 3584."

U.S. v. Gonzalez, 117 S. Ct. 1032, 1035–38 (1997) (Stevens and Breyer, JJ., dissenting).

See *Outline* at V.A.3

"Safety Valve" Provision

Ninth Circuit holds that court's findings for safety valve are not controlled by jury verdict. Defendant was convicted on heroin possession and importation charges. He consistently denied that he knew the suitcase he had been paid to carry contained heroin. The district court believed him and, because defendant otherwise qualified for the safety valve provision, 18 U.S.C. § 3553(f); USSG § 5C1.2, sentenced him below the mandatory minimum. The government appealed, "arguing that the jury's guilty verdict precludes any notion that Sherpa truthfully provided 'all information' he had concerning the offense . . . [and] legally forecloses any possibility that Sherpa's consistent profession of ignorance (regarding the presence of drugs in the suitcase) was based in truth."

The appellate court affirmed. "Section 3553(f) requires a determination by the judge, *not the jury*, as to the satisfaction of the five underlying criteria. This is no accident. The judge is privy to far more information than the jury and is therefore in a much different posture to assess the case and determine whether the defendant complies with § 3553(f)." Although a judge "cannot set aside a verdict just because he or she personally disagrees with a jury's finding," the judge "could logically find that reasonable minds might differ on a given point so as to preclude a judgment of acquittal, but conclude that *he or she* would have voted differently had he or she been a juror. While the judge's personal disagreement has no impact on the jury's finding of guilt, we hold that such disagreement is properly considered in the judge's sentencing decision."

The court also determined that *U.S. v. Brady*, 928 F.2d 844 (9th Cir. 1991), which held that a sentencing judge may not reconsider facts that were necessarily rejected by a jury's not guilty verdict, was effectively overturned by *Koon v. U.S.*, 116 S. Ct. 2035 (1996). *Koon* emphasized "the deference due the sentencing judge" and that sentencing factors should only be excluded from consideration by the Sentencing Commission, not by the courts. "We therefore acted beyond our authority . . . in *Brady* . . . . Consistent with the language of § 3553(f) and the different roles involved when determining guilt and imposing sentence, we hold that the safety valve requires a separate judicial determination of compliance which need not be consistent with a jury's findings."

U.S. v. Sherpa, 97 F.3d 1239, 1243–45 (9th Cir. 1996), *as amended on denial of rehearing and rehearing en banc*, — F.3d — (9th Cir. Mar. 5, 1997).

See *Outline* at V.F.2

Guideline Sentencing Update is distributed periodically to inform judges and other judicial branch personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. *Update* refers to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission, but is not intended to report Commission policies or activities. *Update* should not be considered a recommendation or official policy of the Center; any views expressed are those of the author.

Tenth Circuit holds that in resentencing after § 3582(c)(2) motion for reduction of sentence, safety valve provision may not be applied if original sentence was imposed before effective date of § 3553(f). After defendant was sentenced in 1993 to a 60-month mandatory minimum sentence for marijuana offenses, Amendment 516 (effective Nov. 1, 1995) changed the method for determining the weight of marijuana plants for purposes of sentencing under § 2D1.1(c). The amendment was made retroactive, *see* § 1B1.10(c), and defendant filed a motion for reduction of sentence under 18 U.S.C. § 3582(c)(2). He was still subject to the mandatory minimum term, but argued that he qualified for the safety valve exception to the mandatory minimum, 18 U.S.C. § 3553(f); USSG § 5C1.2, and should be sentenced within the amended guideline range of 18–24 months. The district court held that § 3553(f), which did not take effect until Sept. 23, 1994, could not be applied retroactively to defendant's 1993 sentence and thus the 60-month sentence would stand.

The appellate court agreed that "the safety valve exception applies to all sentences imposed on or after September 23, 1994, . . . and it is not retroactive. . . . We agree with Mr. Torres that when we remand a case to the district court with instructions to vacate the sentence and resentence the defendant, 'the district court [is] governed by the guidelines in effect at the time of resentence' . . . . But that is not the situation Mr. Torres is in. There has been no vacation of his sentence nor any order for resentencing. . . . Rather, he seeks relief pursuant to § 3582(c)(2), which is a different animal."

Under that section, a defendant's "eligibility for a reduction in sentence is 'inexorably tied'" to USSG § 1B1.10, which states in Application Note 2: "In determining the amended guideline range under subsection (b), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. *All other guideline application decisions remain unaffected*." (Emphasis added by court.) "The safety valve exception is specifically excluded from retroactive application by § 1B1.10, and Mr. Torres cannot evade the plain language and effect of this section by characterizing his § 3582(c)(2) motion as requiring de novo resentencing."

U.S. v. Torres, 99 F.3d 360, 362–63 (10th Cir. 1996). *Cf. U.S. v. Polanco,* 53 F.3d 893, 898–99 (8th Cir. 1995) (after vacating sentence for improperly departing from mandatory minimum absent § 3553(e) motion from government, directing district court to consider § 3553(f) when resentencing on remand).

See *Outline* at V.F.1

Sentencing Procedure

Second Circuit uses supervisory authority to require that defendants be given opportunity to have counsel present at debriefing related to substantial assistance reduction. Defendant pled guilty to one racketeering count. He signed an agreement to cooperate with the government which, in return, agreed to file a § 5K1.1 motion for downward departure if it determined that defendant provided substantial assistance. After debriefing defendant, the government did file the motion, but disparaged defendant's assistance as reluctant and less than candid. Relying on the government's characterization, the district court declined to depart more than three months from the guideline minimum of 63 months.

At the sentencing hearing, defense counsel objected to the prosecutor's comments and the sentence, complaining that the prosecutor did not notify her when the debriefing sessions were to occur and that she could have helped her client cooperate more fully. "[T]he prosecutor stated that her failure to give notice to defendant's lawyer was routine, adding that every witness or potential witness in the case was debriefed without counsel being present because that was 'standard practice' in the Eastern District prosecutor's office. The sentencing court found the practice unremarkable" and rejected defense counsel's argument. On appeal defendant contended that the Sixth Amendment entitled him to the assistance of counsel during his debriefing.

The appellate court "d[id] not reach or decide appellant's constitutional argument," instead concluding that "the government's standard practice in this district of conducting debriefing interviews outside the presence of counsel is inconsistent, in our view, with the fair administration of criminal justice. Consequently, we exercise our supervisory authority to bring it to an end, and vacate the judgment in the instant case and remand for resentencing." The court reasoned that "[t]he special nature of a § 5K1.1 motion demonstrates that the government debriefing interview is crucial to a cooperating witness. To send a defendant into this perilous setting without his attorney is, we think, inconsistent with the fair administration of justice."

The court explained that "[d]efendant and his counsel should be given reasonable notice of the time and place of the scheduled debriefing so that counsel might be present. A cooperating witness's failure to be accompanied by counsel at debriefing may later be construed as a waiver, providing defendant and counsel have had notice so that the consequences of counsel's failure to attend could be explained to defendant. . . . Alternatively, waiver can be set forth expressly in the cooperation agreement."

U.S. v. Ming He, 94 F.3d 782, 785–94 (2d Cir. 1996).

See *Outline* generally at IX.C

Departures

Mitigating Circumstances

Fourth Circuit rejects downward departure, sets forth five-step analysis for departure decision. Defendant was convicted on conspiracy and perjury charges. The district court departed downward five offense levels based "on the confluence of six factors": (1) defendant was "a highly decorated Vietnam War veteran [with] an unblemished record of 20 years of service . . . in the military and in the Secret Service; (2) he had a nine-year-old son with neurological problems who was in need of special supervision, and his wife's mental health was fragile; (3) he is recovering from an alcohol abuse problem and requires counseling; (4) his offense was not relatively serious because his scheme to defraud did not involve 'real fraud'; (5) his imprisonment would be 'more onerous' because law enforcement officers 'suffer disproportionate problems when they are incarcerated'; and (6) his status as a convicted felon—which prohibits him, an experienced firearms handler and instructor, from ever touching a firearm again and from voting for the rest of his life—constitutes sufficient punishment when coupled with his sentence of probation."

The appellate court, guided by *Koon v. U.S.*, 116 S. Ct. 2035 (1996), first "prescribe[d] the following analysis for sentencing courts to follow when deciding whether to depart, and we clarify the standards for review of departure decisions:

"1. The district court must first determine the circumstances and consequences of the offense of conviction. This is a factual inquiry which is reviewed only for clear error.

"2. The district court must then decide whether any of the circumstances or consequences of the offense of conviction appear 'atypical,' such that they potentially take the case out of the applicable guideline's heartland. . . . Unlike the other steps in this analysis, a district court's identification of factors for potential consideration is purely analytical and, therefore, is never subject to appellate review.

"3. . . . [T]he district court must identify each [atypical factor] according to the Guidelines' classifications as a 'forbidden,' 'encouraged,' 'discouraged,' or 'unmentioned' basis for departure. Because a court's classification of potential bases for departure is a matter of guideline interpretation, we review such rulings *de novo* in the context of our ultimate review for abuse of discretion. . . . And '[a] district court by definition abuses its discretion when it makes an error of law.' . . . A factor classified as 'forbidden' . . . can never provide a basis for departure and its consideration ends at this step. . . .

"4. . . . 'Encouraged' factors . . . are usually appropriate bases for departure. But such factors may not be relied upon if already adequately taken into account by the applicable guideline, and that legal analysis involves interpreting the applicable guideline, which we review *de novo* to determine whether the district court abused its discretion. . . . Conversely, 'discouraged' factors . . . are '"not ordinarily relevant,"' but may be relied upon as bases for departure '"in exceptional cases"'. . . . When the determination of whether a factor is present to an exceptional degree amounts merely to an evaluation of a showing's adequacy, it becomes a legal question, and our review is *de novo* to determine whether the district court abused its discretion. Finally, . . . 'unmentioned' factors . . . may justify a departure where the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole' indicate that they take a case out of the applicable guideline's heartland. . . . The interpretation of whether the Guidelines' structure and theory allow for a departure is, again, a legal question subject to *de novo* review to determine whether the district court abused its discretion.

"5. As the last step, the district court must consider whether circumstances and consequences appropriately classified and considered take the case out of the applicable guideline's heartland and whether a departure . . . is therefore warranted. Because this step requires the sentencing court to 'make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing' and its comparison of the case with other Guidelines cases, this part of the departure analysis 'embodies the traditional exercise of discretion by [the] sentencing court.' . . . While we review this ultimate departure decision for abuse of discretion, . . . if the district court bases its departure decision on a factual determination, our review of that underlying determination is for clear error. And if the court's departure is based on a misinterpretation of the Guidelines, our review of that underlying ruling is *de novo*."

The court then reversed, finding that none of the factors justified a departure under the foregoing analysis. Defendant's service record and his family responsibilities are "discouraged" factors under the Guidelines, *see* §§ 5H1.6 and 5H1.11, and "the record does not indicate that these factors are present to an 'exceptional' degree." Defendant's alcohol problem is a "forbidden" basis for departure, so it was "legal error and per se an abuse of discretion for the district court to have relied on this factor." The last three factors "are all 'unmentioned' factors. We conclude, however, that none of these factors warranted the district court's downward departure in this case because a departure based on the first two reasons is inconsistent with the structure and theory of the relevant guidelines . . . and the third factor is not present to an exceptional degree."

U.S. v. Rybicki, 96 F.3d 754, 757–59 (4th Cir. 1996).

See *Outline* at VI.C.1.a, h, 2.c, 3, and 5.b

Second Circuit affirms downward departure based on combination of physical impairment and "good works." Based on defendant's health problems and "good acts," the district court departed from offense level 20 to level 10 and imposed a sentence of three years' probation, six months of home confinement, and 500 hours of community service. The government appealed the departure.

Following the *Koon* standard of abuse of discretion for review of departures, the appellate court affirmed. The court recognized that physical problems, § 5H1.4, and "good works," § 5H1.11, are "not ordinarily relevant" to departure decisions. "In extraordinary cases, however, the district court may downwardly depart when a number of factors that, when considered individually, would not permit a downward departure, combine to create a situation that 'differs significantly from the "heartland" cases covered by the guidelines.' U.S.S.G. § 5K2.0 cmt."

The court agreed that defendant's case "differed significantly from the heartland of guideline cases. Rioux had a kidney transplant over 20 years ago, and his new kidney is diseased. Although his kidney function remains stable, he must receive regular blood tests and prescription medicines. As a complication of the kidney medications, Rioux contracted a bone disease requiring a double hip replacement. Although the replacement was successful, it does require monitoring. While many of Rioux's public acts of charity are not worthy of commendation, he unquestionably has participated to a large degree in legitimate fund raising efforts. . . . It was not an abuse of discretion for the district court to conclude that, in combination, Rioux's medical condition and charitable and civic good deeds warranted a downward departure."

U.S. v. Rioux, 97 F.3d 648, 663 (2d Cir. 1996).

See *Outline* at VI.C.1.a and d

To all readers of *Guideline Sentencing Update* and *Guideline Sentencing: An Outline:*

There is an error in the February 1997 edition of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues,* which was distributed throughout the courts in March. Please delete the note on p. 47 at the beginning of section II.C that refers to a 1995 amendment to § 2D1.1(b)(1). That proposed change did *not* go into effect.

Also note:

Have you received a copy of the Center's report *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center's 1996 Survey*? In March, copies were sent to all appeals court and district court judges, all chief probation officers, and all Sentencing Commission commissioners. If you have not received a copy, please fax a request to the Center's Information Services Office at 202-273-4025.

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Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003